SUPREME COURT, U. S.

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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,
Petitioner,

v.

JOHN DODGE,
Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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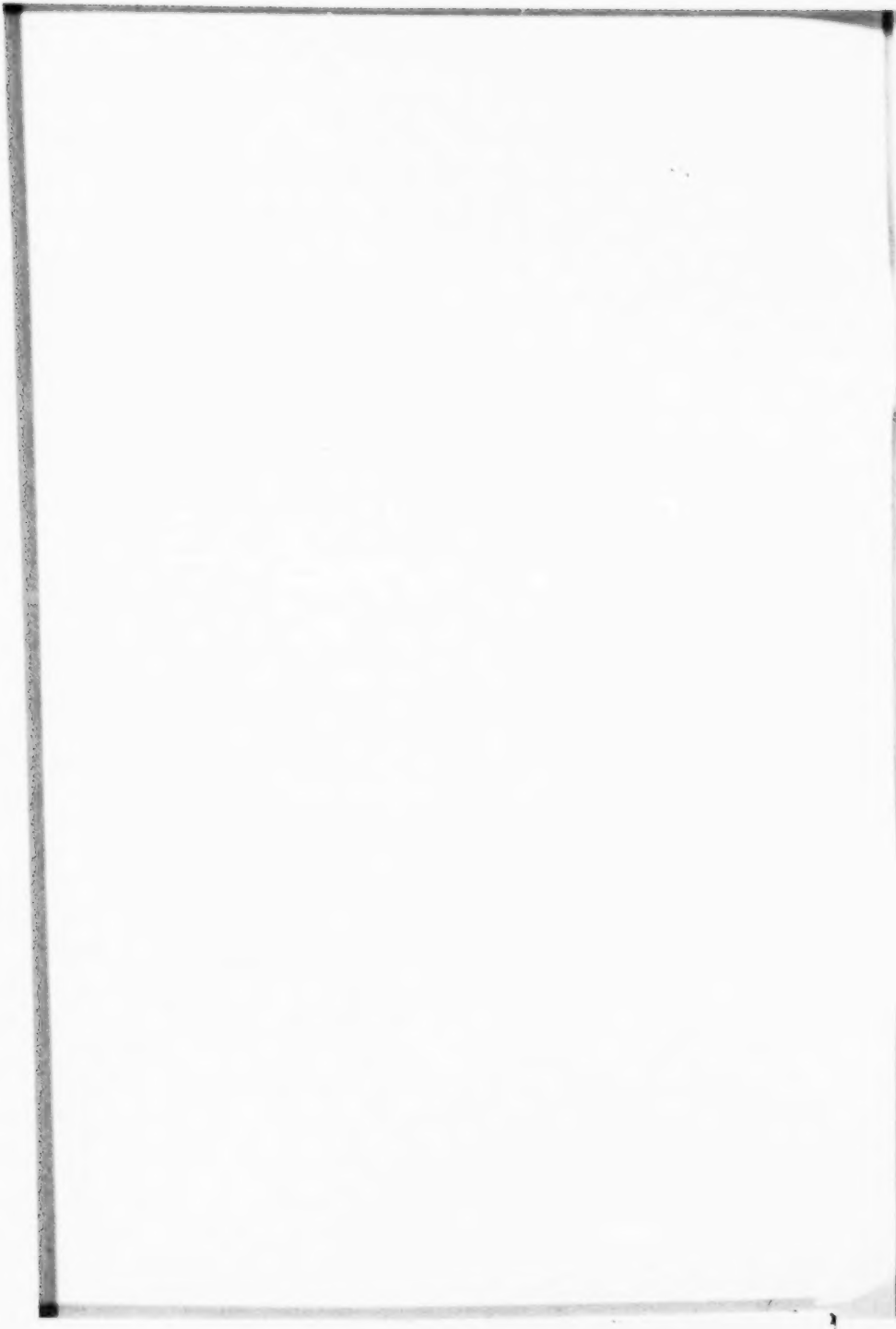

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Mitsui Shintaku Ginko K.K., Tokyo, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 21, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported. The

full text of the opinion appears in the Appendix (A1).

The opinion of the United States District Court for the District of Oregon is not reported. The full text of the opinion appears in the Appendix (A14).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 21, 1975. This Petition for Writ of Certiorari is filed within 90 days of that date. Petitioner believes 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c) confers jurisdiction upon this Court to review that judgment.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that Congress intended, in amending the Longshoremen's and Harbor Workers' Compensation Act (The Act) 33 U.S.C. 901 et seq in 1972, that a partially negligent shipowner should bear the full responsibility for a longshoreman employee's injury while the concurrently negligent stevedore employer recoups compensation benefits it provided the injured longshoreman?

2. Should this Court, in the absence of Congressional action, fashion a fair remedy for a longshoreman injury caused by joint shipowner/stevedore negligence?

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STATUTES INVOLVED

33 U.S.C. § 905(b):

"In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."

STATEMENT OF THE CASE

A. Statement of facts.

Respondent John Dodge (hereafter referred to as "Dodge") brought a negligence action for personal in-

juries against Petitioner Mitsui Shintaku Ginko K.K. (hereafter referred to as 'Shipowner"). The action was for injuries Dodge claimed to have suffered aboard the M.S. KANEYOSHI MARU while employed as a longshoreman by the Respondent Brady-Hamilton Stevedore Company (hereafter referred to as "Stevedore"). The alleged accident occurred on December 7, 1972, at Portland, Oregon.

Shipowner contended that Dodge's injuries were contributed to by Stevedore's negligence and breach of warranty. Shipowner contended that because of Stevedore's negligence, any judgment that Dodge received should be reduced and Stevedore should be denied recoupment of all compensation and medical benefits paid to Dodge pursuant to the Act. Stevedore intervened to defend against these Shipowner contentions, denied any concurring negligence or breach of warranty, and asserted a lien for all compensation and medical benefits paid to Dodge.

Dodge's lawsuit, which was tried to the court without a jury, resulted in the court finding that Dodge, who slipped on ice and snow on the vessel's deck, was injured as a result of the equal concurring negligence of Shipowner and Stevedore, and that Dodge's damages were $9,000.00 The court further ruled that Shipowner was not entitled to have Dodge's $9,000.00 damage award reduced to any extent because of the concurring negligence of Stevedore, and further, that Stevedore was entitled to a "lien" against Dodge's judgment for the $1,454.92 of compensation and med-

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ical benefits it had provided Dodge pursuant to The Act.

Shipowner appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. The Court of Appeals held that a longshoreman who has been injured by the equal concurring negligence of his employer stevedore and the vessel owner can recover the total of his damages from the vessel owner and the stevedore-employer, though concurrently negligent, is entitled to a "lien" for recoupment of its expenditures made under The Act.

This is a companion case to *Shellman* v. *United States Lines, Inc.*, No. 75-3058, decided by Ninth Circuit at the same time and in which a Petition for a Writ of Certiorari will be filed soon. The petitions in *Shellman* and in *Dodge* raise questions similar to those raised in *A/S ARCADIA* v. *Gulf Insurance Company* in which a Petition for a Writ of Certiorari was filed on October 31, 1975 (No. 75-646).

B. Basis for federal jurisdiction.

The District Court's jurisdiction was founded upon 28 U.S.C. § 1332. The Court of Appeals for the Ninth Circuit had jurisdiction for the appeal pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

I

The questions presented for review by this case are of great importance and concern to the shipping industry. After years of case law development, Congress undertook a thorough review of the longshoremen compensation legislation, existing court interpretations of that legislation and third-party litigation involving longshoremen, owners of vessels and stevedore employers. The outcome of that review was The Act amendments of 1972. 33 U.S.C. § 901 *et seq.*

Congress, in the amendments, took away the injured employee's remedy for unseaworthiness of a vessel, eliminating his right to recover from a vesselowner on a basis of near strict liability; the injured employee was given a right to sue a vesselowner for that owner's negligence; the injured employee was given the right to increased compensation benefits to provide more adequate income replacement, and to insure that stevedore employers bear the cost of unsafe conditions. The purpose of requiring stevedore employers to bear the cost of unsafe conditions was to strengthen their incentives to provide on-the-job safety. Senate Report 92-1125, 92nd Cong. 2nd Sess. Longshoremen throughout the United States are vitally interested in a definitive judicial interpretation of these substantive changes in their rights of compensation and recovery against third parties.

In exchange for its increased compensation obliga-

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tions and retained insulation from suit by employees, the amendments relieved stevedore employers from liability to vesselowners for indemnity. The stated goal was to eliminate any requirement for payment by a stevedore employer to a vesselowner of any damages which the vesselowner was required to pay a longshoreman employee in a third-party lawsuit. House Report No. 92-1141, 92nd Cong. 2nd Sess. Stevedore employers throughout the United States are vitally interested in a definitive judicial interpretation of these substantial changes in their compensation obligations and their liability exposure.

As the third part of this legislative revision, the amendments eliminated the shipowner's liability to longshoremen for injuries caused by unseaworthiness of the vessel and shipowners are no longer liable for the negligence of a longshoreman's fellow employee or the negligence of the stevedore company. The shipowner's liability to a longshoreman employee is to be based solely on its own negligence. House Report No. 92-1141, 92nd Cong. 2nd Sess. Shipowners are vitally concerned in having a definitive judicial interpretation of the extent of their liability for longshoremen injuries caused in part by their negligence and in part by the stevedores, a situation of common occurrence on the waterfront.

The opinion in this case by the Court of Appeals holds that a longshoreman, injured by the concurring negligence of the stevedore employer and the shipowner, can recover the total of his damages

from the shipowner and the stevedore is entitled to reimbursement out of that recovery for the full amount of compensation benefits paid to the longshoreman. This harsh and incongruous result stems from a misconceived interpretation of the 1972 amendments to The Act.

The Senate and House Committees which promulgated the amendments emphasized the crucial importance of increased safety on the waterfront and noted that the amendments would accomplish this by "assuring that the employer bears the cost of unsafe conditions," and this would "serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety." Senate Report No. 92-1125, 92nd Cong., 2nd Sess.; House of Representatives Report No. 92-1141, 92nd Cong., 2nd Sess.

The Court of Appeals' interpretation of the amendments freeing the stevedore of any responsibility when some shipowner negligence is shown repudiates the basic emphasis of the amendments, as noted in the preceding paragraph, violates the mandate of The Act (33 U.S.C. 941) of placing responsibility on the stevedore employer "to render safe such employment and places of employment and to prevent injury to his employees" and cannot be reconciled with U. S. Dept. of Labor's Safety and Health Regulations for Longshoring, (29 C.F.R. part 1918) promulgated pursuant to The Act, which puts the onus of obeying the regulations on the stevedore:

"Section 1918.2(a). The responsibility for compli-

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> ance with the regulations of this part is placed upon 'employers' as defined in 1504.3(c)."

The stevedore employer's obligations under the regulations for ice and snow on the deck are clear.

> "1918.91(c). Slippery conditions shall be eliminated as they occur."

The Court of Appeals' interpretation runs contrary to the objectives under The Act of protecting longshoremen and of "placing the burden ultimately on the company whose default caused the injury." *Reed* v. *Steamship Yaka*, 373 U.S. 410 (1963); *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

There is no specific language in the amendments which deals with the result Congress intended when a longshoreman's injury is caused by joint shipowner-stevedore negligence. While the amendments lack any expression of what Congress intended, the strong implication from the language used in Section 905(b) is that Congress intended that shipowners are not to be responsible in full for longshoreman injuries caused in part by the negligence of the stevedore.

That implication is shown by determining what meaning Congress intended should be given the words "caused by the negligence of" found in the first three sentences of that section.

It is a generally accepted rule of statutory construction that when similar words are used in consecutive sentences in a statute, unless otherwise indicated,

it is presumed the legislative body intends the same meaning should be applied throughout. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932). The only meaning that can be given to the key words in the first three sentences, "caused by the negligence of," which make sense when consistently applied is "to the extent caused by the negligence of." If a meaning of "in any way caused by" is used, an injured longshoreman is given a remedy upon any showing of negligence by the shipowner in the first sentence, but is denied a remedy in the second sentence if there is a showing of any concurring negligence by a fellow longshoreman, despite substantial shipowner negligence—an obvious absurd result. If a meaning of "solely caused by the negligence of" is used, an injured longshoreman would only have a remedy when the shipowner's negligence is the sole cause of his injuries in the first sentence, but under the second sentence when hired directly by the shipowner, an injured longshoreman would have a remedy against the shipowner unless the negligence of a fellow longshoreman was the sole cause of his injuries. This again produces an absurd result.

A workable result is achieved only when a meaning of "to the extent caused by the negligence of" is applied to each of the first three sentences of § 905 (b). Under that meaning, a shipowner is liable only to the extent the shipowner's negligence has caused the longshoreman's injury. See Appendix (A18) for a chart showing this analysis of the legal interpretations that can be given to the key words "caused by

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the negligence of" found in the first three sentences of § 905(b).

The Court of Appeals' interpretation of the amendments cannot be square with the meaning of the words "caused by the negligence of" suggested by the foregoing analysis. The suggested meaning "to the extent caused by the negligence of" would make the shipowner liable only to the extent the shipowner's negligence caused injury to the longshoreman which, by necessary corollary, would require a retention of some stevedore liability, be it compensation or some other form of responsibility.

The Committee Reports provide no discussion of what the Committees intended should be the result in the case of joint shipowner-stevedore caused longshoreman injuries, although the Reports do indicate what the Committees intended in a number of areas. The Reports reflect that the Committees intended that the courts should give uniform application to the negligence remedy throughout the United States; that legal questions that arise concerning the longshoremen's negligence remedy should be decided by the courts as a matter of Federal law; that the admiralty concept of comparative negligence and not common law contributory negligence should be applied; and that the concept of assumption of the risk was not applicable as a defense to the longshoremen's negligence action. Senate Report 92-1125, 92nd Cong., 2nd Sess., House Representatives Report No. 92-1141, 92nd Cong., 2nd Sess. The glaring absence of any discussion of what Con-

gress intended in the area of shipowner-stevedore caused injuries should be construed as an invitation to the judiciary to fashion its own rule, considering that 24 years ago, in the *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, case, 342 U.S. 282 (1952) this Court suggested that Congress do so.

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action.

If Congress intended that the law of the *Halcyon* decision should be applied, how simple it would have been for the Committee Reports to say so. It stretches reason to the extreme to conclude that Congress intended for the judiciary to return to *Halcyon* without some token expression of such intention. It seems far more likely that Congress' silence was an intentional recognition of the lead traditionally taken by the judiciary in formulating flexible and fair remedies in the law maritime. See *United States* v. *Reliable Transfer Co., Inc.*, — U.S. —, 44 L. Ed. 2d 251 (1975).

The *Reliable Transfer* case would suggest that a fair remedy in the joint shipowner-stevedore caused injuries would give consideration to the extent to which the fault of each contributed to the longshoreman's injury—something totally lacking in the Court of Appeals' decision. Congressional inaction in this most controversial and ever occurring happenstance of joint shipowner-stevedore caused injuries calls for a fresh evaluation by this Court.

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II

The Court of Appeals' decision in *Dodge* conflicts with the rule in the District of Columbia which allows an injured employee to recover only 50% of his damages from a negligent third party when the negligence of his employer was a concurring cause of the employee's injuries. That rule was discussed by the Court of Appeals for the District of Columbia Circuit in *Murray* v. *United States*, 405 F.2d 1361 (1968). In that case, Murray owned a building which he leased to the United States. A government employee, injured when an elevator in the building fell, received compensation benefits from the United States under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* The government employee sought a damage recovery from Murray for his negligence. The Court of Appeals affirmed the denial of Murray's claim for indemnity and contribution from the United States and in doing so said:

> "Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule in *Martello* v. *Hawley*, 112 U.S. App. D.C. 129, 300 F.2d 721 (1962). *Martello* holds that where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had 'bought his peace,' is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement. In our situation if the building owner is held liable the damages payable should be limited to one-half of the amount of

damages sustained by plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar. A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but that act gave him assurance of compensation even in the absence of fault."

In 1972, the rule in the *Murray* case was discussed at some length by the Court of Appeals for the District of Columbia Circuit in *Dawson* v. *Contractors Transport Corp.*, 467 F.2d 727. Dawson was injured while assisting in loading some refrigerators from a truck during the construction of the Watergate Apartments. Dawson recovered compensation benefits from his employer, a plumbing sub-contractor, under the Longshoremen's and Harbor Workers' Compensation Act. Dawson also sued the general contractor and the owner of the truck for negligence. The owner of the truck claimed over against Dawson's employer seeking a credit of 50% against any judgment that might be awarded against him. The actual issue before the court was whether a defendant claiming over was entitled to a jury trial as a matter of right. In the body of the opinion, the court discussed with approval the so-called Murray Credit Rule:

"Since employers covered by workmen's compensation statutes are not liable in tort to their injured employees, other tortfeasors are not entitled to contribution from a negligent employer, and

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thus, before *Murray*, bore the entire burden of the tort damages.

"To mitigate the harshness of this result, we held in *Murray* that a person against whom the employee was awarded damages in a tort action could reduce the judgment by 50% if he could show that the employer's negligence contributed to the injury."

The conflict between the rule in the Court of Appeals for the District of Columbia Circuit and the rule in the Ninth Circuit announced in the *Dodge* case needs to be reconciled.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January ....., 1976.

Portland, Oregon

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DODGE, Plaintiff-Appellee,	)	
v.	)	
	)	No. 75-1442
MITSUI SHINTAKU GINKO K.K. TOKYO, Defendant-Appellant,	)	OPINION
and	)	
BRADY-HAMILTON STEVEDORE CO., Intervenor-Appellee.	)	

Appeal from the United States District Court
for the District of Oregon

Before: BARNES and BROWNING, Circuit Judges, and BURKE, District Judge.*

* The Honorable Lloyd H. Burke, District Judge, Northern District of California, sitting by designation.

BARNES, Senior Circuit Judge:

Plaintiff, John Dodge, a longshoreman employed by Brady-Hamilton Stevedore Co., suffered injuries when he slipped in snow and ice while working aboard the vessel of defendant Mitsui Shintaku Ginko K.K. Tokyo (herein Mitsui). Under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.), Dodge received compensation and medical benefits from his employer in the total amount of $1,454.92 and brought this third-party action against Mitsui for damages. Brady-Hamilton intervened, seek-

ing reimbursement of its payments under the Act if Dodge were successful in his suit.

The District Judge found both Mitsui and Brady-Hamilton were each fifty percent negligent, that Dodge was not contributory negligent, and (upon stipulation between the parties) that plaintiff had sustained general and special damages amounting to $9,00; and that Brady-Hamilton was entitled to a lienof $1,454.92 against Dodge's recovery, representing compensation it paid to Dodge under the Act.

On appeal, Mitsui, the vessel owner, contends that the equal concurring negligence of Brady-Hamilton should result in a fifty percent reduction of Dodge's judgment against the third party. Secondly, Mitsui argues that this Court should deny Brady-Hamilton a lien upon Dodge's judgment due to the fact that the employer was also negligent.

This case is governed by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* The jurisdiction of thisappeal is based upon 28 U.S.C. § 1291.

The facts of this case are similar to *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1951), where the Supreme Court was confronted with the question whether to apply the doctrine of conribution to non-collision cases in third party actions where the employee has recovered damages from his employer under the Longshoremen's and Harbor Wokers Compensation Act. In that case, the Court refused to allow contribution against the stevedore

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even though the stevedore was more negligent than the vessel in causing the longshoreman's injury. In so holding, the Court stated:

> Halcyon now urges us to extend [the doctrine of contribution] to non-collision cases and to allow a contribution here based upon the relative degree of fault of Halcyon and Haenn as found by the jury. . . . In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. . . . We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. 342 U.S. 284-85.

In *Atlantic Coast Line Railroad Co.* v. *Erie Lackawanna Railroad Co.*, 406 U.S. 340 (1972), the Court reaffirmed its decision in *Halcyon*: "We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third-party complaint for contribution against respondent Erie on the authority of *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952)." 406 U.S. at 340.

Defendant Mitsui contends that the 1972 Amendments to the Act alter the above result. In a very recent case, however, the Supreme Court, even after the 1972 Amendments, viewed its decision in *Halcyon* with approval:

> These factors underlying our decision in *Halcyon* still have much force. Indeed, the 1972 amend-

> ments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy. *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 416 U.S. 106, 112-13 (1974).

In a footnote, the Court in *Cooper* inserted the following remarks in regard to the Amendments:

> Under the 1972 amendments . . . where the vessel has been held liable for negligence "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties shall be void." 33 U.S.C. 905 (b) (1970 ed., Supp. II). The intent and effect of this amendment was to overrule this Court's decisions in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), and *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1957), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and *allowing the vessel* to maintain an action for *indemnity* against the employer. 417 U.S. at 113 n. 6 (emphasis added).

Hence, it appears that the effect of the 1972 Amendments was to disallow both contribution and indemnity. The House Committee Report supports this intent:

> [U]nless . . . *indemnity or contribution* agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from

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a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort. H.R. Rep. No. 92-1441 at 7 (emphasis added).

Recent federal cases also support the view that the third party vessel is not entitled to contribution against the stevedore. A recent district court decision exemplifies this rationale:

> The Act clearly provides for such a suit [against a third party] regardless of the concurrent negligence by the stevedore. . . . [W]e consider it clear that with respect to the stevedore the sole liability was that provided under the Act. Congress sought to eliminate all actions against the stevedore *whether for indemnity or contribution*, whether based on tort or on contract, and whether for fees and expenses. *Lucas* v. *"Brinkness" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974) (emphasis added).
>
> *In accord: Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756 (2d Cir. June 18, 1975); *Hubbard* v. *Great Pacific Shipping Co.*, Civ. No. 74-289 (D. Ore. June 16, 1975); *Santiago* v. *Liberian Distance Transports, Inc.*, Civ. No. 524-7302 (W.D. Wash. June 2, 1975).

In light of the above authority, we hold that the employer-stevedore has no liability to the vessel owner, either directly or indirectly, for personal injury dam-

ages incurred in a compensation-covered accident. *See* Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity For Equitable Uniformity in Tripartite Industrial Accident Litigation*, 19 N.Y.L.F. 587, 594 (1974).

Secondly, even if the doctrine of contribution does not apply here, defendant Mitsui contends that the equal concurring negligence of the stevedore should result in a fifty percent reduction of plaintiff Dodge's recovery aaginst Mitsui. Defendant derives its authority from *Shellman* v. *United States Lines, Inc.*, Civ. No. 73-1902-R (C.D. Cal. Nov. 25, 1974), where the district judge reduced the plaintiff's recovery by the percentage of his own contributory negligence *plus* the percentage of the stevedore's concurring negligence. *See also Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968), which held that where plaintiff's injuries were caused by the concurring negligence of the stevedore, he is only entitled to receive one-half of the damages from the negligent shipowner.

We reject both the *Murray Credit* and *Shellman* Doctrines because they are contrary to the greater weight of authority, and also because they impose unjustified burdens upon the injured longshoreman. The Second Circuit very recently considered the adoption of the *Murray Credit* Theory and rejected it, observing: "We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own neg-

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ligence." *Landon* v. *Lief Hoegh and Co., Inc.*, No. 74-2304, 521 F.2d 756, 763 (2nd Cir. June 18, 1975). The *Murray Credit* Doctrine has also been criticized by commentators. *See, e.g., Cohen & Dougherty, supra*, at 605.

The first District Court, after the passage of the 1972 Amendments, to consider the above question was composed of a three-judge panel which held that the recovery of an injured employee against a negligent vessel owner was not to be diminished by the concurring negligence of the employer stevedore. *Lucas* v. *"Brinkness" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974). In *Hubbard* v. *Great Pacific Shipping Co.*, Civ. No. 74-289 (D. Ore. June 16, 1975), the court rejected both the *Murray Credit* and *Shellman* Doctrines. In so holding, the District Judge observed:

> The defendant-shipowner's two partial theories [*Murray Credit* and *Shellman*] would have the result of negating Congress's intent of eliminating direct or indirect third-party actions in longshoreman-injury cases as embodied in the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act. This is simply a case of *concurring* negligence of the defendant-shipowner and the stevedore which, under a negligence theory, still entitles the plaintiff to a judgment against the defendant-shipowner in the full amount of his damages (emphasis added).

In another recent case, *Santino* v. *Liberian Distance Transports, Inc.*, No. 524-73C2 (W.D. Wash.

June 2, 1975), the District Judge agreed with the rationale of the *Lucas* court. *See Solsvik* v. *Maremar Compania Naviera, S.A.*, No. C75-186S, 399 F. Supp. 712 (W.D. Wash. August 6, 1975). In holding that an employee injured by the concurring negligence of the employer-stevedore and the vessel owner can recover "the *total* of his damages from th shipowner," the court made the following remarks:

> On its face it seems inequitable for a shipowner to be liable to an injured longshoreman for all of the latter's damages if the negligence of the shipowner was not the sole proximate cause of the injuries but rather concurred with the negligence of the stevedore employer. Particularly would this be true if the fault of the stevedore employer were much greater than that of the shipowner. Nevertheless, since the Longshoremen and Harbor Workers' Act is a creature of Congress, it would in this Court's opinion be better for Congress to effect the elimination of any inequity than to have the various District Courts seek to remove that inequity by means which would unavoidably vary from district to district.
>
> Permitting a shipowner to plead the negligence of the stevedore as an affirmative defense would not eliminate inequity. *It would simply shift the inequity from shipowner to injured longshoreman. He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against his stevedore employer.* (emphasis added)

We agree with this rationale. To reduce plaintiff Dodge's recovery here because of the concurring neg-

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ligence of his employer-stevedore, would simply shift the inequity from defendant Mitsui to Dodge. Furthermore, the Supreme Court clearly emphasized in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1952), that it is for the Congress and not for the courts to create a solution to this problem. We therefore hold that a longshoreman who has received injuries caused by the concurring negligence of his stevedore employer and the shipowner can recover the full amount of his damages from the shipowner.

Lastly, defendant Mitusi contends that this Court should deny the stevedore employer a lien upon plaintiff's judgment due to the fact that the stevedore was concurrently negligent. This contention is based on the premise that the employer's right of reimbursement is an equitable one. Being an equitable right, "[t]here is no equity in the principle that a stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence." *Croshaw* v. *Koninklijke Nedlloyd, B.V. Rijswijk*, Civ. No. 74-250, 398 F. Supp. 1224, 1234 (D. Ore. July 31, 1975).

The problem with the above approach is: call the lien what you may, equitable or legal, the reduction of the stevedore's recovery would be another form of contribution, which the Act seeks to prohibit. The Supreme Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full:

> § 33 of the [Longshoremen's and Harbor Workers' Compensation] Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries [The shipowner's] contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of [the shipowner's] liability at the expense of [the stevedore employer] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case. 346 U.S. at 412.

In a recent case, the Second Circuit held that the rule stated in *Pope & Talbott* is still good law. *Landon* v. *Lief Hoegh and Co.*, No. 74-2304, 521 F.2d at 760 (2d Cir. June 18, 1975).[1]

It is clear that, by its terms, § 33(b) of the Act operates to give the employer an assignment of the rights of the injured longshoreman against any third-party tortfeasor *unless* the employee shall have commenced an action against such third party tortfeasor within six months after an award in a compensation order has been made and filed by the Deputy Commissioner or the Board. It is, however, equally clear that the employer's remedy under § 33 of the Act is not his exclusive remedy. In *Federal Marine Term-*

[1] It is indeed questionable whether it is equitable for the stevedore employer to recover the full amount of its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries. The issue before us, however, is not whether *Halcyon* and *Pope & Talbot* were correctly decided. Rather, because these decisions are still good law, our obligation is to apply the principles of those cases to the facts presently before us.

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inals, Inc. v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), the Supreme Court noted:

> When Congress imposed on the employer absolute liability for compensation, it explicitly made that liability exclusive. Yet in the same Act it attached no such exclusivity to the employer's action against third persons as subrogee to the rights of the employee or his representative. . . . [W]e can perceive no reason why Congress would have intended so to curtail the stevedoring contractor's rights against the shipowner. . . . [T]his Court [never] . . . has held that statutory subrogation is the employer's exclusive remedy against third party wrongdoers, and we decline to so hold today. 394 U.S. at 412-14.

Because the employer stevedore's remedy under § 33 is not exclusive, this Court will consider the question whether the stevedore has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the compensation *without* such an award. In the leading case involving this question, the Third Circuit remarked:

> We find no intent indicated by the Act to take away from the employer who pays compensation without an award, his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized *wholly apart from* and without regard for the assignment provided for in Sec. 33(b) of the Act.

> It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. *His right to reimbursement out of the recovery for the employee's injury remains unaffected. The Etna*, 138 F.2d 37, 41 (3rd Cir. 1943) (emphasis added).

Although decided over thirty years ago, *The Etna* still remains controlling. Earlier this year, the Fifth Circuit, in approving of that decision, held:

> The subrogation right where there is no award is a judicial creature with the statute as a rationale. In cases such as this one, where the employee himself sues the third-party tort-feasor, the courts have long recognized a right of subrogation to the extent of payments made, and have permitted the employer or its insurer to intervene in the employee's suit to protect its right, *even where the compensation has been paid without the entry of a formal compensation award.* (emphasis added) (*Allen* v. *Texaco, Inc.*, 510 F.2d 977, 979-80 (5th Cir. 1975); *in accord*: *Louviere* v. *Shell Oil Company*, 509 F.2d 278, 283-84 (5th Cir. 1975); *Fontana* v. *Pennsylvania R.R.*, 106 F. Supp. 461-462-63 (S.D.N.Y. 1952), *aff'd sub nom., Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir), *cert. denied*, 346 U.S. 886 (1953).

This very issue has been presented before this Court. In *Hugev* v. *Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959), the District Judge held that the stevedore employer, even though negligent, having paid benefits under the act without an award, was entitled to the reimbursement

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of its compensation lien out of the employee's recovery against the shipowner. 170 F. Supp at 606-07. On appeal, the District Court's opinion was affirmed in its entirety. *Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960). We believe that this approach is supported by strong authority, and thus hold that the stevedore-employer, even though concurrently negligent, has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the amount without such an award.

In conclusion, in addition to the above ruling, this Court holds that the employer-stevedore has no liability to the shipowner, either directly or indirectly, for personal injury damages incurred in the compensation-covered accident. Secondly, we hold that a longshoreman who has been injured by the concurring negligence of his employer stevedore and the vessel owner can recover the total of his damages from the vessel owner. Applying these principles to the facts of this case, we find that the plaintiff Dodge is to receive $9,000 for his general and special damages from the shipowner, Mitsui. Out of plaintiff's recovery, the employer stevedore, Brady-Hamilton, is entitled to a lien of $1,454.92, representing sums it paid to Dodge under the Act.

Since our holdings agree with that of the District Judge's, the judgment of the District Court is *AFFIRMED.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN DODGE, *Plaintiff,*	)	
v.	)	No. 73-852
MITSUI SHINTAKU GINKO K. K. TOKYO, *Defendant,*	)	FINDINGS OF FACT AND
v.	)	CONCLUSIONS OF LAW
BRADY-HAMILTON STEVEDORE CO. *Intervenor.*	)	

The Court makes the following findings of fact and conclusions of law upon the issues presented in the pretrial order:

FINDINGS OF FACT

I.

Plaintiff is a citizen and resident of the State of Oregon. Defendant is a corporation organized and existing under the laws of a foreign nation with no principal place of business in the State of Oregon. Intervenor is a corporation engaged as a master stevedore. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs. This court has no jurisdiction of the parties and the cause on the law side of the court.

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II.

Defendant is the owner and operator of the vessel M/S KANEYOSHI MARU. On December 7, 1972, plaintiff was working as a longshoreman on board the vessel while it was berthed on navigable waters of the United States at Portland, Oregon. Intervenor was performing the stevedoring services aboard the vessel M/S KANEYOSHI MARU, pursuant to contract, and was the employer of the plaintiff. On December 7, 1972, the plaintiff slipped on snow aboard the deck of the M/S KANEYOSHI MARU causing him injury.

III.

Plaintiff filed a claim pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901 et seq., as amended 1972, for Workman's Compensation benefits as a result of his injury. Intervenor paid to plaintiff the sum of $1,213.92 for time loss benefits and $241.00 in medical expense as required by the Longshoremen's and Harbor Workers' Compensation Act.

IV.

At the time and place of plaintiff's injury, the defendant and intervenor and each of them were negligent in failing to remove the ice and snow from the deck area where plaintiff was required to work, and in failing to place suitable materials such as sand, ashes, sawdust or salt on the ice and snow where plaintiff was required to work and the negligence of

each proximately contributed 50% toward plaintiff's accident and injuries.

V.

As a result of the concurring negligence of the defendant and intervenor, plaintiff slipped and fell and suffered injury to his damage in the sum of $9000.00.

VI.

Plaintiff was not guilty of contributory negligence in any degree.

CONCLUSIONS OF LAW

I.

Defendant is not entitled to have plaintiff's recovery reduced or offset by a credit to the vessel in any amount because of the concurring negligence on the part of the stevedore company.

II.

Plaintiff is entitled to judgment against the defendant in the sum of $9,000.00, together with costs and disbursements.

III.

Intervenor is entitled to a lien in the amount of $1454.92 against plaintiff's judgment against the defendant.

DATED this 19th day of August, 1974.

Gus J. Solomon
Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN DODGE,	)	
Plaintiff,	)	
v.	)	
	)	
MITSUI SHINTAKU GINKO K. K. TOKYO,	)	Civil No. 73-852
Defendant,	)	JUDGMENT
v.	)	ORDER
	)	
BRADY-HAMILTON STEVEDORE CO.	)	
Intervenor.	)	

Based upon the findings of fact and conclusions of law entered herein, it is hereby

ORDERED that plaintiff, JOHN DODGE, have judgment against defendant MITSUI SHINTAKU GINKO K. K., TOKYO, for the sum of $9,000.00, together with his costs in the sum of $122.10 and intervenor is granted a lien in the amount of $1,454.92 against that judgment.

DATED August 28, 1974.

Gus J. Solomon
U. S. District Court

POSSIBLE INTERPRETATIONS OF THE KEY WORDS "CAUSED BY THE NEGLIGENCE OF" FOUND IN SECTION 905(b) OF THE 1972 AMENDMENTS

1ST SENTENCE OF §905(b)

"In the event of injury to a person covered under this Act *caused by the negligence of a vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act. . . ."

Does "Caused by the Negligence of a Vessel" in the Above Sentence Mean:

1. "*in any way* caused by the negligence of a vessel"?
2. "*solely* caused by the negligence of a vessel"?
3. "*to the extent* caused by the negligence of a vessel"?

2ND SENTENCE OF §905(b)

"If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was *caused by the negligence of persons* engaged in providing stevedoring services to the vessel."

Does "Caused by the Negligence of Persons" in the Above Sentence Mean:

1. "*in any way* caused by the negligence of persons"?
2. "*solely* caused by the negligence of persons"?
3. "*to the extent* the injury was caused by the negligence of persons"?

3RD SENTENCE OF §905(b)

"If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was *caused by the negligence of persons* engaged in providing ship building or repair services to the vessel."

Does "Caused by the Negligence of Persons" in the Above Sentence Mean:

1. "*in any way* caused by the negligence of persons"?
2. "*solely* caused by the negligence of persons"?
3. "*to the extent* the injury was caused by the negligence of persons"?

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